Khoh Keow Bok & Ors v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Anor

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO PA-25–32–06 OF 2024
ANAND PONNUDURAI J
5 MARCH 2025

Administrative Law — Judicial review — Application for — Applicants applied for judicial review against respondents against decision to request and impose travel bans due to underpayment of sales tax by company — Whether request was neither susceptible nor amenable to judicial review application — Whether request did not amount to 'decision' — Whether request was not reviewable by virtue of s 31(6) of Sales Tax Act 2018 and s 59A of Immigration Act 1959/63 — Whether action/decision tainted with irrationality, illegality and breach of natural justice — Sales Tax Act 2018 s 31 — Immigration Act 1959/63 s 59A

The applicants were directors of a company known as Wellesley Spice Sdn Bhd ('WSSB'). The Director General of the Royal Malaysian Customs Department ('the first respondent') had issued an assessment notice to WSSB in respect of an alleged underpayment of sales tax aggregating to a sum of RM482,774.15 and demanded such payment be made. WSSB appealed against the demanded sales tax by applying for remission from the Minister of Finance ('MOF'). While the appeal was pending the MOF's consideration, the first respondent issued a request to the Director General of the Immigration Department of Malaysia ('the second respondent') to impose a travel ban on the applicants. Such a request was adhered to by the second respondent and thus imposed. The applicants applied to the first respondent to review the travel ban but was informed that the review could not be processed due to the appeal pending to the MOF. Hence, this judicial review application by the applicants against the respondents. The respondents submitted inter alia that: (a) the request made by the first respondent to the second respondent was neither susceptible nor amenable to judicial review application; (b) the request made by the first respondent did not amount to a 'decision'; and (c) the request for the imposition of the travel ban was not reviewable by virtue of s 31(6) of the Sales Tax Act 2018 ('the STA') and s 59A of the Immigration Act 1959/63 ('the IA').

Held, allowing the application:

(1) The argument advanced by the first respondent that there had been no decision by them but merely a request and that the decision to impose the travel ban was solely that of the second respondent could not be favoured.

Section 31(2) of the STA clearly provided that the second respondent shall exercise all measures to impose a travel ban once a request was received. Furthermore, an application for judicial review was not just limited to a 'decision' by a public body but encompasses actions or omissions as well. The applicants were clearly adversely affected by the first respondent's action in requesting the travel ban and the subsequent action/decision of the second respondent to impose such travel ban based on such a request. As such, the applicants' case had properly been brought via judicial review proceedings (see paras 20–23).

(2) It was clear from a reading of s 31(1) of the STA that the request to impose a travel ban may be made if the first respondent had reason to believe that the applicants were about or were likely to leave Malaysia. A request to issue a travel ban must be premised on such a belief and could not be made purely on the basis that tax was owing. There was nary a whisper nor any reference that there was a belief or basis that the applicants were about to or likely to leave Malaysia without paying. It was certainly irrational for the travel ban to have been requested and issued. Apart from the fact that there was no evidence of the applicants leaving the country without paying tax, such request ought not to have been made whilst there was an appeal pending. The applicants certainly would have suffered irreparable harm by virtue of the travel ban if the appeal was then successful before the MOF (see paras 29–31, 40 & 43).

(3) In relation to s 31(6) of the STA, the bar to legal proceedings being instituted was only in respect of anything lawfully done under the said section. As the request for travel ban was not done lawfully, there was no impediment to the application herein. Additionally, the ouster clause which purported to limit the court's power under s 59A of the IA contravened arts 4(1) and 121(1) of the Federal Constitution and was therefore in breach of the doctrine of separation of powers. Consequently, s 59A of the IA did not oust the court's ability to judicially review the decision of the respondents (see paras 46, 53 & 55).

(4) The action/decision of the respondents to request and issue the travel bans on the applicants were tainted with irrationality, illegality and a breach of natural justice. An order of certiorari was issued to quash the request for the travel ban and an order of mandamus was also issued to remove the travel ban imposed on the applicants (see paras 56–57).

[Bahasa Malaysia summary

Pemohon adalah pengarah-pengarah syarikat yang dikenali sebagai Wellesley Spice Sdn Bhd ('WSSB'). Ketua Pengarah Jabatan Kastam Diraja Malaysia ('responden pertama') telah mengeluarkan notis taksiran kepada WSSB berkenaan dengan dakwaan kekurangan bayaran cukai jualan berjumlah RM482,774.15 dan menuntut agar bayaran tersebut dibuat. WSSB telah

membuat rayuan terhadap taksiran cukai jualan tersebut dengan memohon pelepasan daripada Menteri Kewangan ('MK'). Sementara rayuan tersebut sedang menunggu pertimbangan MK, responden pertama telah mengeluarkan permohonan kepada Ketua Pengarah Jabatan Imigresen Malaysia ('responden kedua') untuk mengenakan sekatan perjalanan ke atas pemohon. Permohonan tersebut telah dipatuhi oleh responden kedua dan dengan itu, sekatan perjalanan dikenakan. Pemohon telah memohon kepada responden pertama untuk menyemak semula sekatan perjalanan tersebut, tetapi dimaklumkan bahawa semakan tersebut tidak dapat diproses kerana rayuan sedang menunggu pertimbangan MK. Oleh itu, permohonan semakan kehakiman ini difailkan oleh pemohon terhadap responden. Responden telah berhujah antara lain bahawa: (a) permohonan yang dibuat oleh responden pertama kepada responden kedua adalah tidak tertakluk mahupun bersesuaian dengan permohonan semakan kehakiman; (b) permohonan yang dibuat oleh responden pertama tidak membawa maksud 'keputusan'; dan (c) permohonan untuk mengenakan sekatan perjalanan tidak boleh disemak berdasarkan s 31(6) Akta Cukai Jualan 2018 ('ACJ') dan s 59A Akta Imigresen 1959/63 ('AI').

Diputuskan, membenarkan permohonan:

(1) Hujah yang dikemukakan oleh responden pertama bahawa tiada keputusan yang dibuat oleh mereka tetapi hanyalah permohonan semata-mata dan keputusan untuk mengenakan sekatan perjalanan adalah semata-mata oleh responden kedua tidak dapat diterima. Seksyen 31(2) ACJ dengan jelas memperuntukkan bahawa responden kedua hendaklah melaksanakan segala langkah untuk mengenakan sekatan perjalanan sebaik sahaja permohonan diterima. Tambahan pula, permohonan untuk semakan kehakiman tidak terhad kepada 'keputusan' oleh badan awam sahaja tetapi merangkumi tindakan atau peninggalan juga. Pemohon jelas terjejas oleh tindakan responden pertama dalam meminta sekatan perjalanan dan tindakan/keputusan responden kedua seterusnya untuk mengenakan sekatan perjalanan tersebut berdasarkan permohonan tersebut. Oleh itu, kes pemohon telah dibawa dengan betul melalui prosiding semakan kehakiman (lihat perenggan 20–23).

(2) Adalah jelas daripada pembacaan s 31(1) ACJ bahawa permohonan untuk mengenakan sekatan perjalanan boleh dibuat jika responden pertama mempunyai sebab untuk mempercayai bahawa pemohon akan atau berkemungkinan akan meninggalkan Malaysia. Permohonan untuk mengeluarkan sekatan perjalanan mestilah berasaskan kepercayaan sedemikian dan tidak boleh dibuat semata-mata atas dasar cukai terhutang. Tiada sebarang bayangan mahupun rujukan bahawa terdapat kepercayaan atau asas bahawa pemohon akan atau berkemungkinan akan meninggalkan Malaysia tanpa membayar. Sememangnya tidak rasional sekatan perjalanan itu diminta dan dikeluarkan. Selain daripada fakta

bahawa tiada bukti pemohon meninggalkan negara tanpa membayar cukai, permohonan itu sepatutnya tidak dibuat sementara rayuan sedang menunggu keputusan. Pemohon pastinya akan mengalami kemudaratan yang tidak dapat dipulihkan disebabkan oleh sekatan perjalanan jika rayuan itu kemudiannya berjaya di hadapan MK (lihat perenggan 29–31, 40 & 43).

(3) Berhubung dengan s 31(6) ACJ, halangan kepada prosiding undang-undang yang dimulakan hanyalah berkenaan dengan apa-apa yang dilakukan secara sah di bawah seksyen tersebut. Oleh kerana permohonan untuk sekatan perjalanan tidak dilakukan secara sah, tiada halangan untuk permohonan di sini. Tambahan pula, klausa pengecualian yang bertujuan untuk mengehadkan kuasa mahkamah di bawah s 59A AI melanggar perkara 4(1) dan 121(1) Perlembagaan Persekutuan dan oleh itu melanggar doktrin pengasingan kuasa. Akibatnya, s 59A AI tidak menyingkirkan keupayaan mahkamah untuk menyemak keputusan responden (lihat perenggan 46, 53 & 55).

(4) Tindakan/keputusan responden untuk meminta dan mengeluarkan sekatan perjalanan ke atas pemohon dicemari dengan ketidakrasionalan, ketidakpatuhan undang-undang dan pelanggaran keadilan semula jadi. Perintah certiorari dikeluarkan untuk membatalkan permohonan untuk sekatan perjalanan dan perintah mandamus juga dikeluarkan untuk membatalkan sekatan perjalanan yang dikenakan ke atas pemohon (lihat perenggan 56–57).]

Cases referred to

Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356; [2022] 5 CLJ 1, FC (refd)

Ketheeswaran a/l Kanagaratnam & Anor v PP [2024] 1 MLJ 851; [2024] 2 MLRA 288, FC (folld)

Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750; [2021] 3 MLRA 1; [2021] 2 CLJ 671, FC (refd)

Nivesh Nair v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors (05(HC)-7–01 of 2020(W)) (unreported) (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 1 MLRA 511, FC (refd)

PP v Kok Wah Kuan [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)

SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356, FC (refd)

Legislation referred to

Federal Constitution art 4(1), 121(1)
Immigration Act 1959/63 s 59A
Prevention of Crime Act 1959 s 15B
Rules of Court 2012 O 53 r 2(4)

Sales Tax Act 2018 s 31, 31(1), (2), (6)

Cheong Yew Sheng (BC Teh & Yeoh) for the applicant.
Mohd Afif bin Ali (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Anand Ponnudurai J:

INTRODUCTION

[1] As the saying goes, the only things certain in life are taxes and death. Both individuals and companies are liable to pay various taxes including tax on income. In cases of companies where tax is payable, the directors may then also be liable to pay those taxes. These proceedings bring to fore the circumstances and extent of action that can be taken against directors of the companies when there are taxes due and owing.

[2] This case in essence relates to the action of the respondents who had issued a travel ban on all four applicants who were directors of a company that owed tax. The applicants now seek the assistance and redress from the court to review the said actions of the respondents with a view of quashing the same and lifting such travel ban.

[3] I will hereinbelow set out the background facts, the parties' respective contentions and my analysis of the same in order to determine if the application herein is with merits.

BACKGROUND FACTS

[4] The background facts that can be gleaned from the affidavits filed herein are largely undisputed and can be summarised as follows.

[5] The applicants are directors of a company known as Wellesley Spice Sdn Bhd ('WSSB').

[6] The first respondent is the Director General of the Royal Malaysian Customs Department ('R1'). The second respondent is the Director General of the Immigration Department of Malaysia ('R2').

[7] The following are the relevant facts/events in chronological order:

Date	Events
18 March 2023	R1 issued an assessment notice to WSSB in respect of the alleged underpayment of sales tax aggregating to a sum of RM482,774.15 and demanded such payment be made.
18 December 2023	WSSB appealed against the demanded sales tax by applying for remission from the Minister of Finance (MOF).
10 January 2024	The MOF confirmed that the appeal application by WSSB for a remission sum of RM440,488.11 has been received which is currently pending the MOF's consideration.
6 March 2024	R1 issued a request to R2 enclosing thereto the name of the applicants requesting R2 to impose a travel ban on the applicants. Such a request was adhered to by R2 and such travel ban thus imposed.
1 April 2024	The applicants applied to R1 to review the decision to impose the travel ban.
8 April 2024	R1 issued a letter to WSSB informing that the review could not be processed due to the appeal pending to the MOF.

[8] The applicants then filed this judicial review application on 4 June 2024 seeking the following reliefs:

(a) a declaration that s 59A of the Immigration Act 1959/63 is inconsistent with art 4(1) of the Federal Constitution and consequently invalid, void, not binding and unenforceable;

(b) an order that s 59A of the Immigration Act 1959/63 be forthwith struck down in its entirety for being unconstitutional;

(c) an order of certiorari to quash the first respondent's decision in the letter from the Royal Malaysian Customs Department dated 6 March 2024 (Ruj KE HD(155)348/02-P KLT14 (SK 36/2024)) that issued a request to the second respondent to impose travel bans on the applicants in order to prevent them from leaving and/or exiting Malaysia; and

(d) an order of mandamus that the second respondent do all that is required and take all necessary steps within seven days from the date of service of this order to remove any travel bans/restrictions/prohibitions imposed upon the applicants as a result of the first respondent's decision in the letter from the Royal Malaysian Customs Department dated 6 March 2024 including but not limited to, removing the applicants' names from all and any travel ban records/blacklists of the Immigration Department of Malaysia.

[9] In light of the Attorney General's Chambers having no objection, the court had granted leave for the judicial review application on 14 August 2024.

[10] The applicants have in their affidavit in support in encl 3 annexed various documents to demonstrate the following:

(a) that the applicants are Malaysian citizens who are permanently residing at/domiciled in Malaysia all these while;

(b) that the applicants are gainfully employed as directors of WSSB;

(c) that the first, thirs and fourth applicants owned real properties that are situated within the jurisdiction of Malaysia;

(d) that at all material times, WSSB's business is a profitable and an ongoing concern that has to be operated under the diligent supervision and stewardship of the applicants;

(e) that WSSB had been conducting its business for approximately 30 years since 1993 and is well established in Malaysia with its main product being Rabbit Brand chilli sauce which is well known among the populace; and

(f) that the first applicant has children studying in Malaysia.

[11] R1 in their affidavit in reply in encl 13 have dedicated a large portion of it explaining how and why tax is payable by WSSB. With respect, with the applicants contending herein that no tax is payable, the court is of the view that the issue of liability of tax or otherwise is not an issue before this court. The issue in these proceedings is rather one concerning the propriety/legality of the travel ban imposed on the applicants. In this regard, in relation to the same, R1 has at paras 8.17 and 11 of their affidavit in reply averred as follows:

> 8.17. Memandangkan tiada bayaran cukai dilakukan setelah luput tarikh bil tuntutan, maka Jabatan Kastam telah memohon kepada Responden Kedua supaya menyekat Pemohon dan Pengarah Syarikat Pemohon daripada keluar negara dengan berasaskan kepada seksyen 31 Akta Cukai Jualan 2018 melalui surat bertarikh 6.3.2024.
>
> ...
>
> 11. Perenggan 7 dan 7.1 Afidavit Sokongan diakui setakat terdapat surat yang meminta sekatan dikeluarkan oleh Responden Pertama, lain-lain pernyataan dinafikan dan Pemohon diletakkan beban pembuktian yang kukuh. Saya telah dinasihati oleh Peguam Kanan Persekutuan dan menyatakan bahawa permohonan sekatan ke atas pengarah Syarikat Pemohon adalah berasaskan kuasa diperuntukkan di bawah Seksyen 31 Akta Cukai Jualan 2018 atas kegagalan pengarah Syarikat Pemohon dan Pemohon dalam membayar cukai sebagaimana dinyatakan dalam bil-bil tuntutan yang bertarikh 22.9.2023 dan sebarang rayuan dikemukakan kepada Kementerian Kewangan tidak menghalang Responden Pertama daripada

mengeluarkan surat permohonan sekatan kepada Responden Kedua dalam melarang penghutang daripada keluar dari Malaysia.

[12] R2 had also filed an affidavit in reply and vide the same they have merely confirmed that they had received such a request from R1 and imposed such a travel ban due to the failure of the applicants to pay tax.

[13] Both respondents in their affidavit also make reference to s 59A of the Immigration Act 1959/63 and aver that their actions were in accordance with law and procedure and not amenable for judicial review.

THE PARTIES' CONTENTIONS/SUBMISSIONS

The applicants' contentions/submissions

[14] The applicant contends/submits as follows:

(a) that R1 is the actual public body empowered to impose the travel ban, whereas R2 merely executed R1's request by imposing the travel ban which is under the purview of its department administratively;

(b) that the decision of the travel ban came from R1 and it was R1 who was required to apply his mind in deciding whether to impose the travel ban;

(c) that R1 failed to exercise its discretion to request/impose the travel ban pursuant to s 31 of the Sales Tax Act 2018 in that he did not have a belief that the applicants were about or likely to leave Malaysia permanently, or abscond without paying tax;

(d) that R1's sole justification for imposing the travel ban was premised on the non-payment of sales tax;

(e) that R1's decision to impose the travel ban has drastically infringed the applicants' constitutional rights ie not to be deprived of personal liberty as enshrined under art 5 of the Federal Constitution;

(f) that R1's failure to consider relevant matters and any evidence when arriving at the decision to request/impose the travel ban is tainted by illegality or irrationality;

(g) that R1's subsequent conduct in refusing to process their request to review the travel ban on the basis that there was a pending appeal is indicative of irrationality as it only means that such a travel ban ought not to have been imposed pending such appeal;

(h) that R1 has acted in breach of natural justice when they deprived the applicants of their opportunity of being heard to satisfy R1 by furnishing some form of security as to the payment of sales tax when R1 refused to process the review; and

(i) that the ouster clause provided under s 59A of the Immigration Act 1959/63 offends art 4(1) of the Federal Constitution and thus is unconstitutional, null and void and that this court may still review the decision on the travel ban.

The respondents' contentions/submissions

[15] The respondents contend/submit as follows:

(a) that the request made by R1 to R2 was neither susceptible nor amenable to judicial review application;

(b) that the request made by R1 does not amount to a 'decision';

(c) that the decision to bar the applicants from leaving the country was made by R2 and not R1;

(d) that R1 has complied with all proper procedures when requesting such travel ban to ban the applicants from travelling abroad;

(e) that the request for the imposition of the travel ban is not reviewable by virtue of s 31(6) of the Sales Tax Act 2018 and s 59A of the Immigration Act 1959/63; and

(f) that the respondents' decision is not tainted with illegality, irrationality or procedural impropriety.

ANALYSIS

[16] As highlighted earlier, this is not a case where the applicants are seeking the court's assistance to review the correctness or otherwise of the tax imposed. That matter will be decided by the Minister in the appeal or by a court in subsequent proceedings, if necessary. This case deals purely with the actions of the respondents in imposing the travel ban on the applicants.

[17] As such, it is apt that this court at the outset consider the request made by R1 and the subsequent imposition of the travel ban by R2. As it is not disputed that such a travel ban is permitted and was imposed pursuant to s 31(1) of the Sales Tax Act 2018, it is imperative to set out s 31 of the Sales Tax Act 2018 as follows:

> 31 Recovery of sales tax, etc, from persons about to leave Malaysia without paying sales tax, etc
>
> (1) Where the Director General has reason to believe that any person is about or is likely to leave Malaysia without paying:
>
> (a) any sales tax due and payable by him under subsection 26(5);
>
> (b) any penalty payable by him under subsection 26(8);

A

(c) any surcharge accrued by him under subsection 32(3);

(d) any fee payable by him under this Act; or

(e) any other money recoverable from him under this Act, the Director General may issue to the Director General of Immigration a notice containing particulars of the person and the offence committed with a request that the person be prevented from leaving Malaysia unless he pays the sales tax, surcharge, penalty, fee or other money, or furnishes security to the satisfaction of the Director General for its payment.

B

C

(2) Subject to any order issued or made under any written law for the time being in force relating to immigration, the Director General of Immigration who receives a request under subsection (1) in respect of a person shall exercise all measures which may include the removal and retention of any certificate of identity, passport, exit permit or other travel documents in relation to that person as may be necessary to give effect to the request.

D

(3) The Director General shall cause the notice under subsection (1) to be served personally or by registered post on the person to whom the notice relates.

E

(4) The non-receipt of the notice under subsection (1) by that person referred to in subsection (3) shall not invalidate anything done under this section.

(5) Where the person in respect of whom a notice has been issued under subsection (1) produces, on or after the date of the notice, a written statement signed by the Director General stating that all the sales tax, surcharge, penalty, fee or other money specified in the notice have been paid, or that security has been furnished for its payment, that statement shall be sufficient authority for allowing that person to leave Malaysia.

F

(6) No legal proceedings shall be instituted or maintained against the Federal Government, a State Government or any other public officer in respect of anything lawfully done under this section.

G

[18] A perusal of R1's request dated 6 March 2025 would clearly reveal that it was made pursuant to s 31 of the Sales Tax Act 2018.

H

[19] Having read s 31 of the Sales Tax Act 2018, it is clear to the court from the heading and the body of the same, that it is a provision that comes into play when a person is about to leave Malaysia without paying tax and where the Director General has reason to believe that any person is about or is likely to leave Malaysia without paying tax. In such a circumstance, by virtue of the use of the word 'may', the Director General has the discretion whether to issue a request to the Director General of Immigration ('DGI') to prevent them from leaving Malaysia unless they pay tax or furnishes security to the satisfaction of the Director General. By virtue of the word 'shall' in s 31(2) of the Sales Tax Act

I

2018, once the DGI receives such a request, he must exercise all such measures to impose such travel ban so as to give effect to the request. A

[20] Before the court deals with the substantive arguments, the court will first consider the argument advanced by R1 that there has been no decision by them but merely a request and that the decision to impose the travel ban was solely that of R2. B

[21] However, the court does not find favour with such contention of the respondents as there can be no dispute that s 31(2) of the Sales Tax Act 2018 clearly provides that the DGI *shall* exercise all measures to impose a travel ban once a request is received. C

[22] Furthermore, and in any event, it is trite law now that an application for judicial review is not just limited to a 'decision' by a public body but encompasses actions or omissions as well. In this regard, O 53 r 2(4) of the Rules of Court 2012 reads as follows: D

> Any person who is adversely affected by the decision, action, or omission in relation to the exercise of the public duty or function shall be entitled to make the application. E

[23] In my considered view, the applicants herein are clearly adversely affected by R1's action in requesting such travel ban and the subsequent action/decision of R2 to impose such travel ban based on such a request. As such, the court is of the view that the applicants' case has properly been brought via judicial review proceedings. F

[24] In any event, R1 in their submissions have concluded by submitting that the respondents' decision was made in accordance with law and not tainted with illegality, irrationality or procedural impropriety. G

[25] As such, the court will now proceed to determine if the said decision to impose such travel ban is tainted with illegality, irrationality or procedural impropriety. H

[26] On the present facts, it is undisputed that the sole reason for R1 to make such a request to impose the travel ban under s 31(1) of the Sales Tax Act 2018 was because WSSB's tax was unsettled. As highlighted above, s 31(1) of the Sales Tax Act 2018 comes into play or is applicable when a person owing tax is about or likely to leave Malaysia without paying the same. I

[27] The rationale for this would appear sound when there are situations where a taxpayer may be looking to abscond without paying his tax, especially

foreigners. In this regard, if the Director General has evidence of this, or has reason to believe that the taxpayer is likely to leave without paying, he is certainly entitled to exercise his discretion and to make such a request.

[28] In this case, the crux of the applicants' case is that the request made by R1 to R2 to impose a travel ban is irrational and in breach of natural justice as that pre-requisite of the applicants about to leave Malaysia without paying tax has not been met. The court finds merits in the applicants' contentions for the following reasons.

[29] First and foremost, it is clear from a reading of s 31(1) of the Sales Tax Act 2018 that the request may be made if the Director General has reason to believe that the applicants are about or are likely to leave Malaysia.

[30] In the court's view, a request to issue a travel ban must be premised on such a belief and cannot be made purely on the basis that tax is owing. If that was the intent, then s 31(1) of the Sales Tax Act 2018 would have clearly been worded differently. This court must give effect to the plain and unambiguous wording of s 31(1) of the Sales Tax Act 2018.

[31] As such, the court has to consider whether there was such a belief that the applicants are about or likely to leave Malaysia without paying such tax. I have perused the affidavits of the respondents as well as the notice dated 6 March 2024 and there is nary a whisper nor any reference that there was a belief or basis that the applicants were about to or likely to leave Malaysia without paying. The said request dated 6 March 2024 is reproduced for its full effect which will clearly reveal that there is no mention about them leaving.

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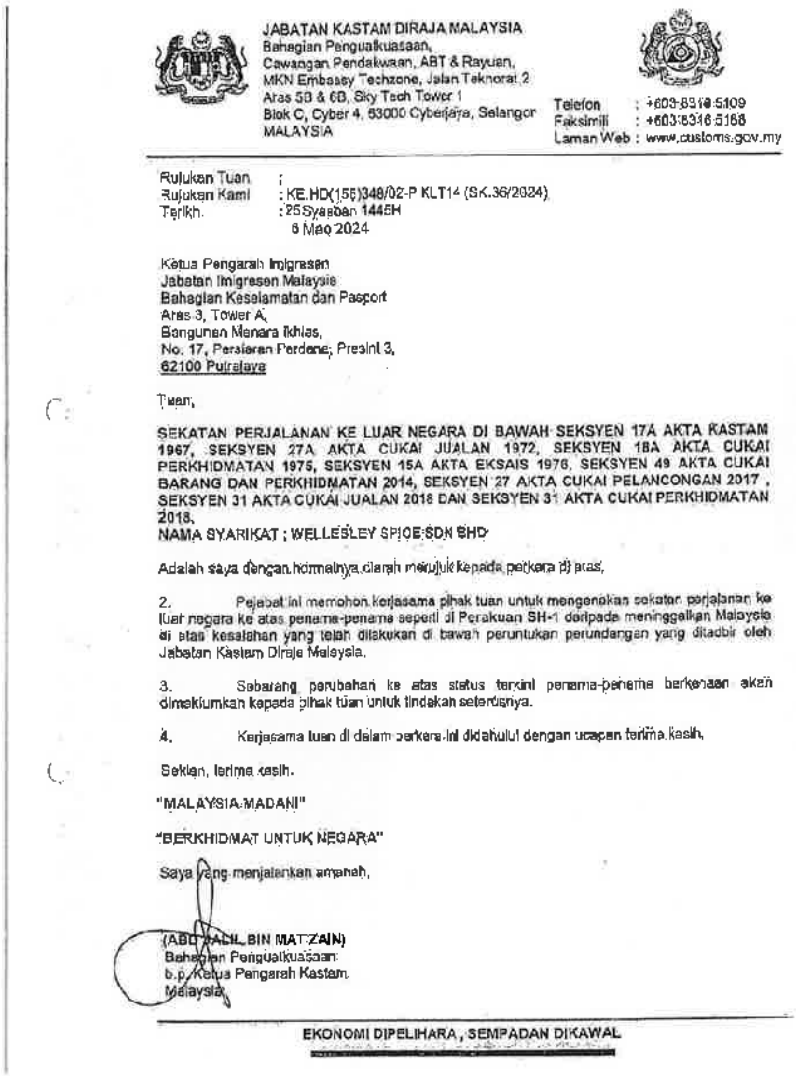

JABATAN KASTAM DIRAJA MALAYSIA
Bahagian Penguatkuasaan,
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MKN Embassy Techzone, Jalan Teknorat 2
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Rujukan Tuan :
Rujukan Kami : KE.HD(155)348/02-P KLT14 (SK.36/2024)
Tarikh. : 25 Syaaban 1445H
6 Mac 2024

Ketua Pengarah Imigresen
Jabatan Imigresen Malaysia
Bahagian Keselamatan dan Pasport
Aras 3, Tower A,
Bangunan Menara Ikhlas,
No. 17, Persiaran Perdana, Presint 3,
62100 Putrajaya

Tuan,

SEKATAN PERJALANAN KE LUAR NEGARA DI BAWAH SEKSYEN 17A AKTA KASTAM 1967, SEKSYEN 27A AKTA CUKAI JUALAN 1972, SEKSYEN 18A AKTA CUKAI PERKHIDMATAN 1975, SEKSYEN 15A AKTA EKSAIS 1976, SEKSYEN 49 AKTA CUKAI BARANG DAN PERKHIDMATAN 2014, SEKSYEN 27 AKTA CUKAI PELANCONGAN 2017 , SEKSYEN 31 AKTA CUKAI JUALAN 2018 DAN SEKSYEN 31 AKTA CUKAI PERKHIDMATAN 2018.
NAMA SYARIKAT ; WELLESLEY SPICE SDN BHD

Adalah saya dengan hormatnya diarah merujuk kepada perkara di atas.

2. Pejabat ini memohon kerjasama pihak tuan untuk mengenakan sekatan perjalanan ke luar negara ke atas perkara-perkara seperti di Perakuan SH-1 daripada meninggalkan Malaysia di atas kesalahan yang telah dilakukan di bawah peruntukan perundangan yang ditadbir oleh Jabatan Kastam Diraja Malaysia.

3. Sebarang perubahan ke atas status terkini perkara-perkara berkenaan akan dimaklumkan kepada pihak tuan untuk tindakan seterusnya.

4. Kerjasama tuan di dalam perkara ini didahului dengan ucapan terima kasih.

Sekian, terima kasih.

"MALAYSIA MADANI"

"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(ABD HALIL BIN MAT ZAIN)
Bahagian Penguatkuasaan
b.p. Ketua Pengarah Kastam
Malaysia

EKONOMI DIPELIHARA, SEMPADAN DIKAWAL

A

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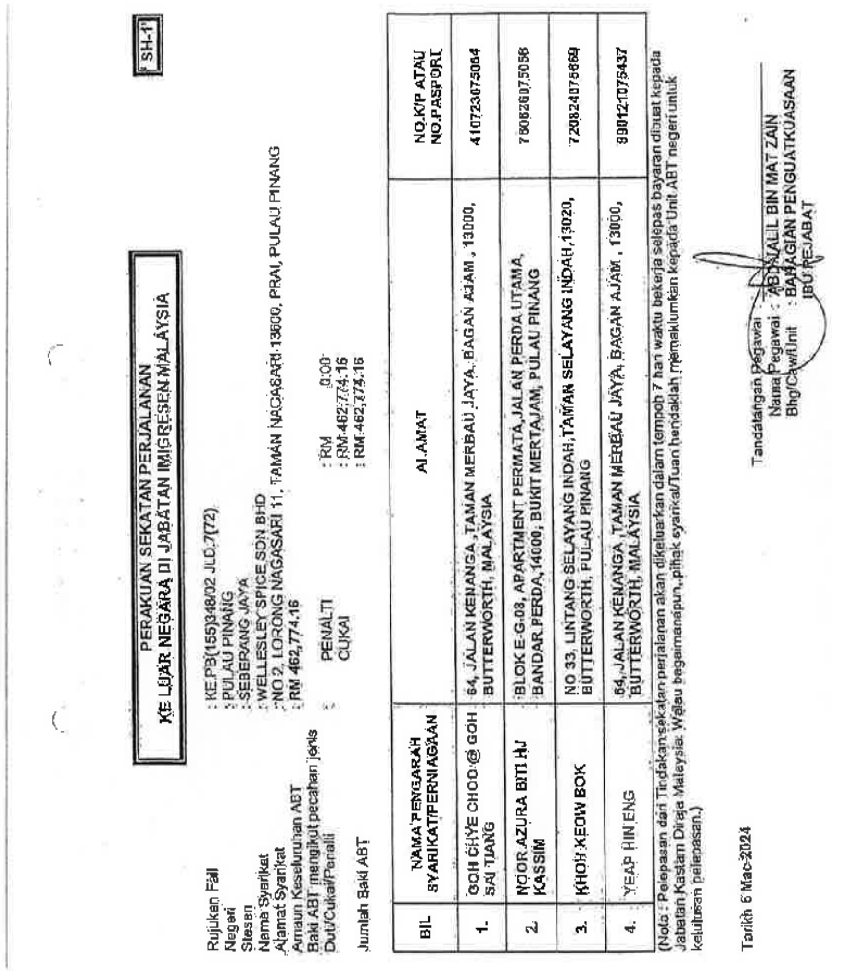

PERAKUAN SEKATAN PERJALANAN
KE LUAR NEGARA DI JABATAN IMIGRESEN MALAYSIA

SH-1

Rujukan Fail : KEP3(155)348/02 JLD.7(72)
Negeri : PULAU PINANG
Stesen : SEBERANG JAYA
Nama Syarikat : WELLESLEY SPICE SDN BHD
Alamat Syarikat : NO 2, LORONG NAGASARI 11, TAMAN NAGASARI 13600, PRAI, PULAU PINANG
Amaun Keseluruhan ABT : RM 462,774.16
Baki ABT mengikut pecahan jenis Dut/Cukai/Penalti : PENALTI : RM 0.00
CUKAI : RM 462,774.16
Jumlah Baki ABT : RM 462,774.16

BIL	NAMA PENGARAH/ SYARIKAT/PERNIAGAAN	ALAMAT	NO.K/P ATAU NO.PASPORT
1.	GOH CHYE CHOO @ GOH SAI TIANG	64, JALAN KENANGA, TAMAN MERBAU JAYA, BAGAN AJAM, 13000, BUTTERWORTH, MALAYSIA	410723075064
2.	NOOR AZURA BINTI HJ KASSIM	BLOK E-G-08, APARTMENT PERMATA, JALAN PERDA UTAMA, BANDAR PERDA, 14000, BUKIT MERTAJAM, PULAU PINANG	780826075056
3.	KHOH KEOW BOK	NO 33, LINTANG SELAYANG INDAH, TAMAN SELAYANG INDAH, 13020, BUTTERWORTH, PULAU PINANG	720824076669
4.	YEAP HIN ENG	64, JALAN KENANGA, TAMAN MERBAU JAYA, BAGAN AJAM, 13000, BUTTERWORTH, MALAYSIA	930412075437

(Nota : Pelepasan dari Tindakan sekatan perjalanan akan dikeluarkan dalam tempoh 7 hari waktu bekerja selepas bayaran dibuat kepada Jabatan Kastam Diraja Malaysia. Walau begaimanapun, pihak syarikat/Tuan hendaklah memaklumkan kepada Unit ABT negeri untuk kelulusan pelepasan.)

Tarikh 6 Mac 2024

Tandatangan Pegawai :
Nama Pegawai : ABDULLIL BIN MAT ZAIN
Bhg/Cawangan/Unit : BAHAGIAN PENGUATKUASAAN
IBU PEJABAT

H

[32] The respondents in their affidavits also made no averments in relation to there being any such belief.

I

[33] On a separate issue, the applicants also contend that there has been non-compliance with s 31(1) of the Sales Tax Act 2018 as there has been a failure in the request to state the particulars of the person and the offence committed. However, having considered the request dated 6 March 2018 as set out above, it is clear that the four applicants have been provided. Whilst the specific provisions of the Sales Tax Act 2018 allegedly breached have not been specifically set out, it is clear that the offence committed was non-payment of tax. As such, it cannot be said that the notice failed to contain particulars as alleged by the applicants.

[34] Another issue raised by the applicants is in relation to the issue of furnishing security to the satisfaction of the Director General of Customs.

[35] In this regard, there is no dispute that the Director General of Customs did not attempt to get the applicants to furnish security but had immediately made the request to R2.

[36] The applicants now contend that this was a breach of natural justice and such a request to them to furnish security should have been made first.

[37] Surprisingly, the respondents now submit that it is the applicants who have failed to communicate with them in relation to the furnishing of security and that the applicants are only entitled to commence judicial review proceedings if R1 decides to reject any proposal to furnish securities.

[38] In the court's view, nothing much turns on this issue as there was no request nor offer to furnish security.

[39] However, bearing in mind the consequences of the travel ban, it is certainly desired that parties or taxpayers who owe tax be informed beforehand that a travel ban will be imposed unless the tax is paid or security furnished. This would be consonant with adhering to the principles of natural justice.

[40] In the upshot, having considered all matters, as there was no reason to believe that the applicants were about or likely to leave Malaysia without paying the outstanding tax owed by WSSB, it was certainly irrational for the travel ban to have been requested and issued.

[41] The respondents had also clearly failed to take into account a relevant consideration that there must be first a reasonable belief that the person is about to leave the country without paying tax before requesting such a travel ban.

[42] In the court's further view, it was clearly an error of law when the request for travel ban was made purely on account that tax was owing. R1 has also failed to take into account the fact that an appeal was pending before the MOF on the imposition of the tax which indicates that it was certainly unnecessary/unwarranted to request such travel ban when there was an appeal pending.

[43] In addition, as seen earlier, when they were requested by the applicants to review the travel ban, R1's position was that they could not do the same due to the pending appeal. This further fortifies the court's view that quite apart from the fact that there was no evidence of the applicant's leaving the country without paying tax, such request ought not to have been made whilst there was an appeal pending. In the court's view, the applicant's certainly would have suffered irreparable harm by virtue of the travel ban if the appeal was then successful before the MOF.

[44] As such, in the upshot and after considering all matters, the court is certainly minded to issue an order of certiorari to quash the action of R1 of issuing a request to R2 to impose the travel ban vide letter dated 6 March 2024 and also mandamus to R2 to remove the travel ban.

[45] However, that is not the end of the matter as the court will have to now nonetheless deal with the issue raised by the respondent ie the existence of s 31(6) of the Sales Tax Act 2018 and s 59A of the Immigration Act 1959/63 which they contend bars this court from making any orders in this application.

[46] Firstly, in relation to s 31(6) of the Sales Tax Act 2018, in the court's view, the bar to legal proceedings being instituted is only in respect of anything lawfully done under the said section. As the court has determined above that the request for travel ban was not done lawfully, there is no impediment to the application herein.

[47] Moving on to s 59A of the Immigration Act 1959/63 which both parties have submitted extensively on. Section 59A of the Immigration Act 1959/63 (commonly referred to as an ouster clause) reads as follows:

> 59A Exclusion of judicial review
>
> (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, 'judicial review' includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;

(b) an application for a declaration or an injunction;

(c) any writ of habeas corpus; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

[48] The respondents rely on the above express provision as well as the decisions in cases such as *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 1 MLRA 511; *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341 as well as the majority decision of the Federal Court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 3 MLRA 1; [2021] 2 CLJ 671 to contend that the decision to issue the travel ban is unreviewable by this court.

[49] However, with respect, in light of the recent developments and in particular several Federal Court decisions, the court is of the view that s 59A of the Immigration Act 1959/63 does not oust the court's power to review a decision by the Executive. Apart from relying on recent decided cases, the court is thankful to learned counsel for the applicants who has brought to the court's attention several articles such as *The Malaysian Basic Structure* 2023 2 CLJ (i) by Gopal Sri Ram as well as one by Dr Wilson Tay Tze Vern entitled *Maria Chin Abdullah and the Basic Structure Doctrine in Malaysian Jurisprudence* whereby the above articles trace the development of the law in relation to this issue of the validity of ouster clauses.

[50] Firstly, the attention is drawn to the case of *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356; [2022] 5 CLJ 1, the Federal Court having considered the ratio in *Maria Chin* held that the ouster clause provided under s 15B of the Prevention of Crime Act 1959 being inconsistent with art 4(1) of the Federal Constitution is void and of no effect in that it cannot operate to immunise all decisions made under s 15B of the Prevention of Crime Act 1959by the use of the ouster clause save for procedural irregularities. See also the cases of *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356 and *Nivesh Nair v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* (05(HC)-7–01 of 2020(W)) (unreported) where the 'ouster clauses' were accordingly struck down as being void by the Federal Court.

[51] The above ruling in *Dhinesh Tanaphll* was recently affirmed in the case of *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor* [2024] 1 MLJ

851; [2024] 2 MLRA 288 in which a five-member panel led by Chief Justice Tun Tengku Maimum held that the interpretation to be afforded to the present art 121(1) read with art 4(1) of the Federal Constitution has been settled beyond a shadow of doubt by numerous recent decision of the Federal Court and that it is the minority judgments in *Maria Chin Abdullah* (affirmed in *Dhinesh Tanaphll*) which accurately reflects the state of the constitutional law with regards to the basic structure doctrine which is essentially the doctrine of constitutional supremacy and the constitutional judicial review in art 4(1) of the Federal Constitution as complemented by its device of judicial power of art 121(1) of the Federal Constitution. This court does not now propose herein to undertake herein a detail analysis on the various decisions the Federal Court over the years on this issue. However, I gratefully refer to and adopt the following passage from the Federal Court in the case of *Ketheeswaran* where the learned Chief Justice enunciated as follows:

> [18] The recent cases, heavily condensed for brevity, stand as authorities for the proposition that art 121(1) in its present form no less preserves the sacrosanct concept of judicial power and judicial review. When read harmoniously with arts 4(1), 121(1) reposes judicial power and its concomitant device of judicial review, singularly in the superior courts. Any attempt to whittle away this power, or to replace it entirely whether by legislation or by an executive act is an incursion into judicial power and void under art 4(1). A very clear example of this is ouster clauses which were, in the past, a legislative attempt to oust the supremacy of the FC and as such, void for seeking to mute judicial power and scrutiny (*Maria Chin, Zaidi Kanapiah, Dhinesh* and *Nivesh*).

[52] Crucially, the Federal Court in *Ketheeswaran*'s case has overruled the previous decisions of *Sugumar Balakrishnan* and *Kok Wah Kuan*.

[53] Thus, applying the abovementioned current law to the present facts, the court is of the considered view that the ouster clause which purports to limit the court's power under s 59A of the Immigration Act 1959/63 contravenes arts 4(1) and 121(1) of the Federal Constitution and is therefore in breach of the doctrine of separation of powers.

[54] It has also not escaped the court's attention that the applicants have sought a declaration that s 59A of the Immigration Act 1959/63 is unconstitutional and be forthwith struck down in its entirety for being unconstitutional.

[55] The court however is not so minded to make such a declaration but will nonetheless conclude that s 59A of the Immigration Act 1959/63 does not oust the court's ability to judicially review the decision of the respondents herein.

CONCLUSION

[56] As such, in the upshot and for the reasons stated above, the court is of the view and concludes that the application herein is with merits in that the action/decision of the respondents to request and issue the travel bans on the applicants are tainted with irrationality, illegality and a breach of natural justice.

[57] As such prayers 1.3 and 1.4 of the applicant's application herein are allowed whereby an order of certiorari is issued to quash the request for the travel ban by R1 dated 6 March 2024 and an order of mandamus is also issued against R2 to remove the travel ban imposed on the applicants.

[58] Finally, I find it appropriate to order the respondents to pay costs of RM5,000 to the applicants as fair and reasonable costs for the application.

Application allowed.

Reported by Nabilah Syahida Abdullah Salleh